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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1967

No. 400

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, LOCAL 415, et al.,

Petitioners,

v.

SCHERER & SONS, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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TOPICAL INDEX

	Page
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	3
Statement	3
Argument	7
Conclusion	19
Certificate of Service	19

CITATION OF AUTHORITIES

	Page
A. F. L. v. American Sash & Door Co. 335 U.S. 538, 68 S. Ct. 260	8
Algoma Plywood Co. v. Wisconsin Board 23 LRRM 2402, 336 U.S. 301, 69 S. Ct. 584, 93 L.Ed. 691	8
Allen Bradley v. Local 3, International Brotherhood of Electrical Workers, (1945) 325 U.S. 797	9
Employee Lithographers of Greater Miami v. National Labor Relations Board 301 F. 2d 20 (C.A. 5, 1962)	16
Hescom Inc., v. Stalvey, et al. Dist. Ct. of Appeal, First Dist. (Fla. June 25, 1963) 155 So. 2d 3	13
Kitchens, et al. v. John Doe, et al. (March 16, 1965) 172 So. 2d 896	6
Lincoln Federal Labor Union v. Northwest Iron & Metal 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212	7
Local Union 10, United Association of Plumbers v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946	8
Local Union No. 189, Amalgamated Meat Cutters, etc. v. Jewel Tea Company (1965) 85 S. Ct. 1596	8

CITATION OF AUTHORITIES (cont.)

	Page
Local No. 438 Laborers v. Curry, (1963) 83 S. Ct. 531	15
National Labor Relations Board, Petitioner v. International Union of Operating Engineers, Local Union No. 12, AFL-CIO, Respondent. 293 Fed. 2d 319 (C.A. 9)	10
NLRB v. Amalgamated Lithographers of America 309 F. 2d 31 (C.A. 9, 1962) cert. den. 372 U.S. (1963)	16
Retail Clerks International Association Local 1625 v. Schermerhorn 375 U.S. 96, 84 S. Ct. 219 (1963)	11
373 U.S. 746, 83 S. Ct. 1461 (1963)	12
Scherer & Sons, Inc. v. International Ladies' Garment Workers' Union, Local 415, et al. 142 So. 2d 290	2
Truck Drivers Local No. 413 v. N.L.R.B. 334 F. 2d 539 (C.A.D.C. 1964)	16
United Mine Workers of America, Petitioner v. James M. Pennington, et al. (1965) 85 S. Ct. 1585	8
Vegas Franchises, Ltd. v. Culinary Workers (Nevada, May 1967) (65 LRRM 2671)	8

CITATION OF AUTHORITIES (cont.)

	Page
Florida Statutes 447.01	App. 1
Florida Statutes 447.03	App. 1
Florida Statutes 447.09	App. 2
Labor Management Relations Act of 1947, as amended 29 U.S.C.A.	10
Constitution of the State of Florida, Section 12, Declaration of Rights	15

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BRIEF OF RESPONDENT IN OPPOSITION

Opinions Below

The Order of Dismissal of the Supreme Court of Florida sought to be reviewed is contained in the Appendix A, page 1, attached to the petition.[1] (A:1) The Opinion of the District Court of Appeal (A:2-5) is reported

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[1]A = Appendix A to the Petition for Writ of Certiorari filed by the Union.

All reference to appendices, therefore, is reference to those attached to the Petition for Writ of Certiorari.

in 188 So.2d 380, while the earlier pertinent Opinion of the Supreme Court of Florida (A: 18-28) is reported in 142 So.2d 290.

The Final Decree of the Circuit Court (A: 11-14) and its Order Denying Rehearing (A: 6-10) are unreported.

Jurisdiction

The Order (A: 1) of the Supreme Court of Florida (infra, p.A:1) was entered February 20, 1967. Jurisdiction is invoked under 28 U.S.C. 1257(3).

Question Presented

May a non-union employer, pursuant to the right preserved by the Florida Right-to-Work law enjoin concerted activities (of a union and a union organized manufacturers' association) engaged in for the purpose(s) of

1. Compelling the employer to require its employees to join a union as a condition of employment;

and/or

2. (a) Compelling the discontinuance of business and commerce between the non-union employer and union organized manufacturers' association;

(b) Eliminating any non-union competi-

tion with the union organized manufacturers;

where the only alternative to 1 and/or 2, supra, is the ultimate forced cessation of its business, depriving the employer and employee(s) alike of their livelihood?

Statutes Involved

The pertinent provisions of the National Labor Relations Act and of the Florida Constitution are set forth in petitioner's Appendix B (B:1-14);[2] Pertinent references to portions of the Florida Statute regulating labor organizations (Florida Statutes 447) are contained in the Appendix attached hereto.

Statement

The trial court's findings (A:11-13) set out in the Final Decree (A:11-14), and re-confirmed in the Circuit Court Order Denying Rehearing (A:6-10) are virtually unchallenged by the petition(er).[3] Evidence adduced at the trial of this cause on the 11th day of March, 1965 reveals the following:

The defendants in this cause, the Union and the Florida Apparel Manufacturers' Association (which said Asso-

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[2]B = Appendix B to the Petition for Writ of Certiorari.

[3]The union does recite, at the bottom of page 3 of its brief: The Union demanded and secured this provision "to make sure that... working conditions are at a level which would "defend the standards of our members"... all this referring of paragraph 6 of the Supplemental Agreement (R: 23-26, 213-216, 250, 291).

ciation has long since abandoned any pretext of a defense to the activity complained of), entered into the agreement for the dual purpose of organizing Scherer & Sons, Inc., and of eliminating non-union competition with the defendant, Florida Apparel Manufacturers' Association (R: 356-358).[4] So testified Mel Warshaw (R: 355-365) who at times pertinent was a member of the Association (R: 355), and who further said that paragraph 6 of the agreement complained of was directed to Scherer & Sons, Inc. (R: 357)

Sol Meyerson, (R: 365-385), a member of the defendant Apparel Association (R: 366) related, with regard to paragraph 6 of the Supplement, that the purpose was, among other things, "to eliminate non-union competition" (R: 373), and that Scherer was "the prime objective of this particular clause"[5] (R: 369), stating, as well, that the purpose was for the unionization of all of Scherer's employees in order to get the shop not only unionized but to get the union's men's dues (R: 369). He participated in discussions with both the Association and the Union with regard to the purposes of paragraph 6 of the Supplement (R: 367, 368, 370, 376). Meyerson declared that the Association and the Union agreed to help each other organize Scherer (R: 376). He was personally instructed by the Union not to do business with Scherer & Sons, Inc. (R: 376-377; 380-385). Meyerson testified specifically:

> **"The purpose of paragraph 6 was to get all of the employees of Scherer & Sons forced to become members of the Union."** (R: 381)

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[4] R = Record on appeal.

[5] Paragraph 6 of the Supplement.

None of the above testimony taken at the trial of this cause was thereafter rebutted.

Joseph Scherer, president of Scherer & Sons, Inc. (R: 330-352) related how the company lost work and the employees lost jobs (R: 333) because of the Union activity; his employees were well qualified to do the work ordered until it was taken from him (R; 337). He told of the Union and the Association combining to organize his employees (R: 341); that such was the purpose of the agreement. The Respondent company, of course, was picketed and, of course, deliveries ceased because thereof (R: 353, 354)

Scherer & Sons, Inc. and its employees, because of the acts complained of and "the conduct stemming therefrom, have suffered loss of earning in business and as wages and have been irreparably injured". (A: 4, 12, 20).

The trial (R: 318-410) resulted in the entry, on March 12, 1965, of the Final Decree (A: 11-14) wherein the trial court found:

(1) The equities of the cause with Scherer and against the defendants (Union and Manufacturers' Association);

(2) **Scherer proved** the **allegation** of the complaint as amended **by clear** and **convincing evidence;**

(3) **Scherer** and **its employees,** because of the conduct of the Union and the Association, **suffered economic loss(es)** and **have been irreparably injured;**

(4) the **concerted activities** complained of and proven **constitute** both **primary** and **secondary economic pressures** for purpose of **compelling Scherer to execute a contract** with the Union and **to require Scherer's employees to join** the **Union as a condition of employment** even though **no** employee is a member of the Union.... all in violation of the Florida right-to-work law(s) as defined and set out in 142 So. 2d 290;

(5) the **compulsive pressures** brought upon Scherer and its employees by the Union and Association, acting in concert, **are tantamount to the taking** of Scherer's **property without due process of law.**

and permanently **enjoined** the **Union** and the **Apparel Association** from, in any manner, **violating the provisions of the Florida Right-to-Work** Law(s); the final decree enjoined picketing **where,** not **as,**[6] violative of the "right-to-work" provisions of the Florida Constitution.

The Petitioner, in its statement "argues" the **Kitchens** case[7] (A:37-41) which the trial court had before it, and distinguished, at the time (April 6, 1965) of the entry of its "Order Denying Rehearing" (A:6-10); the **District Court of Appeal,** on the appeal from the final decree (A:11-14), refused to hold this cause governed by its

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[6]Petitioner recites on page seven (7) of its petition that the court "...enjoined peaceful picketing *as* violative of the" 'right-to-work' provision (infra pp. A:13-14)

[7]*Kitchens, et al.* v. *John Doe, et al.* (March 16, 1965), 172 So. 2d 896.

Kitchens' decision, by ignoring, and by silence effectively repudiating, the same, and held and "determined that the evidence supports the findings and that no error has been made to appear..." and affirmed the decree (A:5).

The Supreme Court of Florida at the time, February 20, 1967 (A:1), of the entry of the Order (A:1) appealed from had the benefit of the District Court's Kitchens' opinion, 172 So. 2d 896 (A:37-41)[8]

ARGUMENT

In its "Reasons for Granting the Writ" the Petitioner (Union) ignores the fact that this Court has long upheld the applicability (and constitutionality) of right-to-work laws in situations not unsimilar to the confronta-

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[8]Indeed, the Supreme Court of Florida, on *November 9, 1966*, in a 4 to 3 per curiam decision, 194 So. 2d 258 (A: 32-36) refused, on jurisdictional grounds, to hear an appeal from the District Court of Appeal's Kitchens decision. The Per Curiam decision (A:32) in its entirety recites: "This appeal reflected apparent jurisdiction and the case was heard on oral argument of the parties. After hearing argument and upon further considering the matter, we have determined the appeal does not lie because we lack jurisdiction to consider it pursuant to Article V, Section 4, Florida Constitution. Therefore, it is ordered this appeal be dismissed"; however, the minority, speaking through Mr. Justice Roberts (A: 33-36) believed the Court did have jurisdiction to review and should review Kitchens for as Mr. Justice Roberts said: "...the view announced by the District Court of Appeal, Third District, would render sterile the Right to Work Law in Florida and would result in an odd situation where, by the decision of the United States Supreme Court and an Act of Congress Florida has the right to have a Right to Work Law, but would not have jurisdiction to protect persons claiming the right to work thereunder" (A:36). Mr. Justice Roberts would quash the Kitchens decision (A:36); but, be that as it may, by the Order of February 20, 1967 (A:1) the Supreme Court of Florida lets stand and thereby re-affirms its *decision in 142 So. 2d 290 as the controlling law under the Florida Constitution*, Declaration of Rights (Right-to-Work Law) *and applicable in this cause*.

tion here. In 1949, the Supreme Court upheld the constitutionality of right-to-work laws in a decision dealing with the Nebraska and North Carolina laws and a separate decision on the Arizona law. (See **Lincoln Federal Labor Union** v. **Northwest Iron & Metal,** 335 U.S. 525, 69 S. Ct. 251, 93 L. Ed. 212, and **A. F. L.** v. **American Sash & Door Co.,** 335 U.S. 538, 68 S. Ct. 260, 93 L. Ed. 222.

Four years later the Supreme Court also held that peaceful picketing[9] to force a violation of state right-to-work laws may be enjoined by the state courts without infringing the free speech guarantee of the Fourteenth Amendment to the Constitution. Local Union 10, United Association of Plumbers v. **Graham,** 345 U.S. 192, 73 S. Ct. 585, 97 L. Ed. 946.

With respect to federal preemption in this field, the Court in 1949 upheld the jurisdiction of the Wisconsin Employment Relations Board to order an employer to cease and desist from giving effect to a maintenance-of-membership contract found to violate state law and to reinstate and give back pay to an employee discharged pursuant to the contract. (Algoma Plywood Co. v. Wisconsin Board, 23 LRRM 2402), 336 U.S. 301, 69 S. Ct. 584, 93 L. Ed. 691.

Consider the fairly recent **Pennington** and **Jewel Tea** anti-trust cases.[10] In the **Pennington** case the basic issue

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[9]See *Vegas Franchises, Ltd.* v. *Culinary Workers* (Nevada May 1967) (65 LRRM 2671) where peaceful picketing was enjoined under state right-to-work law.

[10]*United Mine Workers of America, Petitioner,* versus *James M. Pennington, et al. (1965) 85 S. Ct. 1585,* and *Local Union No. 189, Amalgamated Meat Cutters, etc.* versus *Jewel Tea Company* (1965) 85 S. Ct. 1596.

was whether the union could enter into a collective bargaining agreement with a multi-party bargaining unit regarding wages and, as a part of that agreement, undertake to impose the same standards on other small producers without regard to their ability to pay (the instant case). Mr. Justice White stated that the anti-trust laws applied to a conspiracy of employers and the union to eliminate competition based on sub-standard wages; the concurring opinion of Mr. Justice Douglas went even beyond the Mr. Justice White opinion. In Mr. Justice White's opinion he reasoned that a group of employers **could not** conspire **to eliminate competitors,** and the union was liable if it joined the conspiracy even though the union's part was to impose uniform wages on all the industry, and this opinion extends even the **Allen Bradley** decision **(Allen Bradley v. Local 3, International Brotherhood of Electrical Workers,** (1945) 325 U.S. 797, 65 S. Ct. 1533. In the case at bar the facts reveal that the Union and the Association mutually joined together in concerted action, if indeed not a conspiracy, far exceeding the requirements of either the **Pennington, Allen Bradley** or the **Jewel Tea Company** case(s), supra. The net result seems to be that an industry-wide agreement by union and employers setting up a wage structure (as perhaps at least inferred by Petitioner here) beyond the financial ability of an employer to pay and made to force employer(s) out of business is in itself a **prima facie** violation of the anti-trust laws. True these cases refer to federal anti-trust law(s) but it would logically follow that the principles pronounced therein would equally be applicable here and would not in any manner be preempted.

In National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local Union

No. 12, AFL-CIO, Respondent, 293 Fed. 2d 319 (CA. 9), the Court of Appeals for the Ninth Circuit (Cal.) held that **an attempt to force one employer to sever business relations with another person is not protected by virtue of reliance upon a contract with employer.** This the Court did in construing the effect of Section 8(e), added by Section 704(b), Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 543; 29 U.S.C.A. Section 158 (e)).

Respondent points out that this case is of importance in that the Petitioner endeavors to contend and does contend that the Courts of the State of Florida have no jurisdiction, and said Petitioner, in support of its position, erroneously refers, as material, to so-called contractual provisions of the Taft-Hartley Law, the Petitioner more specifically assuming the following:

(A) Petitioner lends its contractual provision a legitimate error by asserting that it was arrived at by the collective bargaining process for the purpose of protecting wages, hours and working conditions of the employees whom the union represents (even though evidence in the record does not support such an assumption.)

(B) Petitioner contends that the subject matter herein is at least arguable within Section 8(e) of the Labor-Management Relations Act as Amended, 29 U.S.C.A. 158 (e), and therefore the Courts of Florida are precluded from acting in these matters (even though the Petitioner offers no evidence as to why it is arguable within this

Section of the Federal Act), the decision of the Supreme Court of Florida (142 So.2d 290) notwithstanding.

Assuming all of the arguments of the Petitioner **are supported by evidence,** they are to no avail as a defense to the Respondent's contention that the Petitioner has violated the law of the State of Florida and that the Courts of the State of Florida have jurisdiction. All of Petitioner's arguments are disposed of in the **Operating Engineers** case, supra, for in this case the union had a collective bargaining agreement with the employer wherein if the employer subcontracted work, said subcontractor must meet the terms of the collective bargaining agreement. The company then proceeded to subcontract work out, in violation of this agreement, to subcontractors who were non-union. The union then began activities with the object of causing the company to cancel its work with the subcontractors. The Court held that Section 8(e) of the Federal Act "does not legalize strikes **or other coercive** action to enforce such clauses." (Underscoring ours) And further, **"An attempt to enforce one employer to sever business relations with another person is not protected by virtue of a reliance upon a contract with an employer."**

Examination of this cause and the Petitioner's own authorities make obvious the correctness of the decision in 142 So. 2d 290. An examination of the case of **Retail Clerks International Association Local 1625 v. Schermerhorn,** 375 U.S. 96, 84 S. Ct. 219 (1963) reveals, as is set out in Syllabus (1) on page 219 thereof, that the sole question therein was whether the **Florida courts,** rather than solely the National Labor Relations Board, **are tribunals with jurisdiction to enforce the states prohibition against an**

"agency shop" clause in a collective bargaining agreement, the Supreme Court of the United States having earlier, in the same action, 373 U.S. 746, 83 S. Ct. 1461 (1963) declared that Section 14(b) of the National Labor Relations Act subjected an agency shop agreement to **state substantive law,** saying, in effect, that 14(b) removes the protection of the Section 8(a)(3) proviso of the Taft-Hartley law, that is to say, the protected feature of the Act.

The recital, by Mr. Justice Douglas in the second **Schermerhorn** case, supra, that "state power" recognized by Section 14(b) begins only with actual negotiations and execution of the type agreement described by Section 14(b) is as stated by Mr. Justice Roberts (A:34) "only a small part of the **dictum"** (underscoring ours) in **Schermerhorn** and the "quoted language" by Mr. Justice Douglas was not necessary to a decision of the matter pending before the Supreme Court of the United States and was merely a side thought — 'on the other hand' etc. — and amounted to obiter dicta and as such is not binding on this Court."

Respondent points out the contention that there are agreements, executed by this Petitioner (Union) and others, which directly affect the rights of Respondent and its employees. But more important, Mr. Justice Douglas further wrote (immediately following the above quoted portion of the decision):

> **"Absent such an agreement, conduct arguably an unfair labor practice would be a matter for the National Labor Relations Board under Garmon." (Underscoring ours).**

The **Supreme Court of the State of Florida,** in construing right-to-work laws and the exemption provided by 29 U.S.C.A. 164(b), held in this case (142 So.2d 290) that **the conduct complained of and occurring was neither protected nor prohibited by federal statutes** (A:24, 27). A more concise and accurate and lucid construction of the controlling provisions of the Florida Constitution and the exemption provided by Section 14(b) of the Labor Management Relations Act of 1947 as amended, has never heretofore been stated.

It is obvious that **the activities** of the Union (and the Association) are/were **for the purpose of coercing** the Respondent's **employees to join the Union,** as well as **coercing** and intimidating the **employer to force the employees to join the Union,** against their will, and **to deny unto,** *all* **the right to work** because of no contract and because the employees are not members. In short, Respondent says that the Union was attempting, among other things, to require the Respondent to discharge (fire) the employees if they did not join the Union with or without regard to the execution of any contract.

Petitioner attempts to make light of the decision in **Hescom, Inc. v. Stalvey, et al.** District Court of Appeal, First District (Fla. June 25, 1963) 155 So. 2d 3, in view of the pronouncement by the District Court of Appeal, Third District, supra, ignoring completely that by holdings subsequent to the **Kitchens** opinion the District Court of Appeal for the Third District of Florida and the Supreme Court of the State of Florida has in fact, at least by indirection, adopted the principles in 142 So. 2d 290 and negated **Kitchens.** The law in **Hescom,** supra, was good law when decided and is good law now and the Court, there, speak-

ing through Mr. Justice Wigginton, on page 9 of its decision (referring to the Schermerhorn case, supra) stated:

> "The rationale of the foregoing decision is to hold that a labor union may not do indirectly that which the law prohibits it from doing directly. By analogy we are impelled to conclude in the case now before us that the defendant union may not through the technique of peaceful picketing precipitate a condition which by indirection has the effect of forcing an employer to enter into a collective bargaining agreement with it and compel its employees to join the union against their will, an objective which the rulings of our Supreme Court have held to be illegal as violative of an individual's right to work in a lawful occupation or trade. As said by the Supreme Court in the Paramount Enterprises case:
>
> > "Personal liberty and private property are fundamental rights in this country. The very purpose of law is to protect these rights. Any unlawful interference with them by false statement, acts of coercion, intimidation, malice or covert implications that threaten mischief or injury to them may be enjoined.
>
> **"To judicially sanction the act of a labor organization which by premeditated design either directly or indirectly denies a person the right to work because of his non-membership in a labor union would negate and render impotent the**

> **guarantees contained in Section 12 of the Declaration of Rights of our State Constitution. Any such rule of law would be contrary to the public policy of Florida as determined by its citizens and their duly elected representatives in the State Legislature.**" (Underscoring ours)

Moreover, Judge Dekle, the trial judge in the case at bar, stated: "*It does not appear that the right-to-work question has been presented in just the light*[11] *in any of the previous cases.*"

Respondent has always contended that any construction/interpretation of our right-to-work law(s) where picketing is for the reason stated by Mr. Justice Thornal (A: 18-28) is in no way dependent upon, nor requires the use of, 14(b), 29 U.S.C.A. 164(b), nor for that matter, any interpretation relied upon by the Petitioner in the **Schermerhorn** case(s), nor the case of **Local No. 438 Laborers v. Curry** (1963) 83 S. Ct. 531, for this cause **need not necessarily be concerned in the final analysis with contracts, union security agreements,** hiring hall activities, and the ilk. Respondent claims that 14(b) should not be equated with our constitutional Amendment and says that resort to 14(b) is not even needed to give sanctity to our "Right-to-Work" law(s); Florida's constitutional amendment became effective long before the passage of the Labor Management Relations Act of 1947, as amended (Taft-Hartley Law). When the Court concluded, in construing our right-to-work law(s) together with the exemption provided by 29 U.S.C.A. 164(b), **that the conduct complained of here, is neither protected nor prohibited by**

[11]The Court is obviously referring to the portion of Judge Thornal's opinion in 142 So. 2d 290 relative to the irreparable harm resulting from compulsion to require employees to join the Union.

the federal labor statutes, it could well have reached, and should now reach and recite, the same conclusion without reference/resort to 14(b) either as a crutch or otherwise, or in any manner. So even without 14(b), the result should be as claimed by the Respondent.

As for the exemption granted this Union, in 1959, by Section 8(e) of the National Labor Relations Act it is but necessary to point out that two of the Union's citations[12] in support of its position are based solely upon the case of **Employee Lithographers of Greater Miami** v. **National Labor Relations Board,** 301 F. 2d 20 (C.A. 5, 1962) which this Respondent discussed at great length in a petition filed by the Respondent in this Court in 1965 (the same being Case No. 188 - October Term 1965) which this, the Supreme Court of the United States, declined to grant; Respondent claimed then, and claims now, that a ruling on the constitutionality of this exemption or, more specifically, a determination of the illegality of proviso/exemption granted the garment workers in 8(e), was unnecessary to a determination of the issues involved in these three (3) cases (as the Court obviously recognized in the **Employee Lithographers** case, supra, by the use of its words "in the meantime"). In fact, the Court there construed the hot cargo provisions of the Taft-Hartley Act and held the following:

> "We hold that the exemption does not deny due process under the Fifth Amendment **to the members of the union** here. It may be that the lithographic workers can make a case for exemption

[12] *NLRB* v. *Amalgamated Lithographers of America,* 309 F. 2d. 31 (C. A. 9, 1962) cert. den. 372 U. S. (1963); *Truck Drivers Local* No. 413 v *NLRB,* 334 F. 2d 539 (C.A.D.C. 1964).

but that is a matter that addresses itself under our system of government of the wisdom of the Congress. In the meantime, we preserve the prescription of the statute, and the exemption to the garment workers." (Emphasis ours.)

But most importantly the Fifth Circuit was not confronted, as in this case, with the head on collision where an "employer" directly is denied guaranteed constitutional rights **in a confiscatory manner in violation of due process.** Needless to say, this Respondent has previously sought, in Petition No. 188, a determination of the constitutionality of the exemption provided for the garment industry under Section 8(e) of the Taft-Hartley Act (the same being question number 3 presented in the Petition.) **It is the position of the Respondent that Section 8(e) was unconstitutional then and is unconstitutional now,** and should be so held if this Court determines 8(e) in any way adversely affecting Respondent; an additional proviso in Section 8 of the Labor Management Relations Act of 1947, as amended, recites **"that nothing in this subsection shall set aside the final proviso as to Section 8(a)(3) of this Act"** referring to **"that nothing in this Act shall** prohibit the enforcement of any agreement which is within the foregoing exception." Respondent points out that the Florida "Right-to-Work" law is not **"in this Act"** and that said last proviso is ineffective with regard to the provisions of Section 12, Declaration of Rights, Florida Constitution (B: 3) which reflects the public policy (see Appendix hereto) of the State of Florida.

Overlooked, as well, was the fact that there exists no labor dispute, either in the classical, traditional or any

other sense (nor is what occurred in this cause a labor dispute by definition in/by either the Taft-Hartley, Wagner, Norris-La Guardia, Mediation or any other law, or decision thereunder) a labor dispute being defined by Section 2(9) of the Act (29 U.S.C.A. 152(9) as:

> "(9) The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

None of the Respondent's employees engaged in the picketing or a strike by reason of the picketing. The Union has never been certified nor recognized as the bargaining agent for the Respondent's employees at the time of the picketing or any other time. No employee ceased work as a result of the picketing. Further, the Union disavows that the purpose of the picketing was for organization or recognition purposes.

See Petition for Writ of Certiorari No. 1397, October Term 1966, also denied by this Court, of which Respondent requests this Court to take judicial notice.

CONCLUSION

For the reasons above stated, certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari have been furnished to MORRIS P. GLUSHIEN, General Counsel, International Ladies' Garment Workers' Union, AFL-CIO, 1710 Broadway, New York, New York 10019, and HERBERT L. KAPLAN, ESQ., 1674 Meridian Avenue, Miami Beach, Florida 33139, Counsel for Petitioners, by mail this 7th day of December, 1967.

JOSEPH A. PERKINS